**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

| | | |
|---|---|---|
| **KEVIN OLDEN** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 233,582 |
| **TREESCAPE & IRRIGATION, INC.** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **TRAVELERS INSURANCE COMPANY** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent and its insurance carrier (Respondent) appealed the Award dated May 8, 2001, entered by Administrative Law Judge Jon L. Frobish. The Appeals Board (Board) heard oral argument in Wichita, Kansas, on December 14, 2001.

### APPEARANCES

Joseph Seiwert of Wichita, Kansas, appeared for claimant. William L. Townsley, III, of Wichita, Kansas, appeared for respondent.

### RECORD AND STIPULATIONS

The Board considered the record and adopts the stipulations listed in the Award. In addition, the parties agreed during oral argument to the Board that the record should also contain the transcripts of the June 4, 1998 Preliminary Hearing and the April 29, 1999 Motion Hearing.

### ISSUES

The parties agree that if this claim is compensable, the Board should affirm the ALJ's award of permanent partial disability benefits based upon a nine percent impairment of function to the body as a whole. The ALJ granted claimant's request for benefits after finding that claimant was an employee rather than an independent contractor for purposes of the Workers Compensation Act. Respondent disputes that finding and the finding concerning claimant's average weekly wage. Those are the only issues on this appeal.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

On an appeal from a preliminary hearing Order, the Board found this claim to be compensable. In that Order dated July 28, 1998, the Board made the following findings and conclusions:

## FINDINGS OF FACT

After reviewing the record compiled to date, the Appeals Board finds:

(1) The parties agree claimant was injured on May 2, 1998, when a nail gun accidentally fired and drove a nail into claimant's heart.

(2) Claimant is a framer who was employed full time for a local residential construction company. Respondent is a landscaping and nursery business.

(3) Respondent had started to build a relatively simple structure that would be used to shade trees and plants. Claimant agreed to work on the project in his spare time for $15 per hour.

(4) Respondent furnished the materials for the project. On several occasions, respondent directed claimant to change the way the structure would be built due to the materials respondent had on hand from earlier construction projects.

(5) Claimant used his own hand tools and ladders to work on the project, except for two chain saws that respondent provided.

(6) The project was expected to last three to seven days depending upon the number of individuals who worked on it. Respondent assigned several of its employees to assist claimant.

## CONCLUSIONS OF LAW

(1) The Workers Compensation Act is to be liberally construed to bring employers and employees within its provisions and protections.[1]

[1] K.S.A. 1997 Supp. 44-501(g).

(2) Workers compensation statutes are to be liberally construed to effect legislative intent and award compensation to a worker where it is reasonably possible to do so.[2]

(3) It is often difficult to determine in a given case whether a person is an employee or independent contractor since there are elements pertaining to both relations that may occur without being determinative of the relationship.[3]

(4) There is no absolute rule for determining whether an individual is an independent contractor or an employee.[4]

(5) The relationship of the parties depends upon all the facts and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.[5]

(6) The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result which is to be accomplished. It is not the actual interference or exercise of the control by the employer but the existence of the right or authority to interfere or control, which renders one a servant rather than an independent contractor.[6]

(7) In addition to the right to control and the right to discharge the worker, other commonly recognized tests of the independent contractor relationship are (1) the existence of a contract to perform a certain piece of work at a fixed price, (2) the independent nature of the worker's business or distinct calling, (3) the employment of assistants with the right to supervise their activities, (4) the worker's obligation to furnish necessary tools, supplies, and materials, (5) the worker's right to control the progress of the work, (6) the length of time for which the worker is employed, (7) whether the worker is

---

[2] Kinder v. Murray & Sons Construction Co., Inc., Docket No. 76,296 (Kan. 1998). [Kinder v. Murray & Sons Constr. Co., 264 Kan. 484, 957 P.2d 488 (1998).]

[3] Jones v. City of Dodge City, 194 Kan. 777, 402 P.2d 108 (1965).

[4] Wallis v. Secretary of Kans. Dept. of Human Resources, 236 Kan. 97, 689 P.2d 787 (1984).

[5] Knoble v. National Carriers, Inc., 212 Kan. 331, 510 P.2d 1274 (1973).

[6] Wallis, at 102–103.

> paid by time or by job, and (8) whether the work is part of the regular business of the employer.[7]
>
> (8) For purposes of the Workers Compensation Act, claimant's relationship with respondent was more in the nature of an employee than that of an independent contractor. That conclusion is based upon the facts that (1) claimant was not engaged in an independently established trade or business, (2) claimant was paid on an hourly basis rather than for a completed project, (3) respondent provided the materials for the project rather than allowing claimant the freedom to obtain those necessary, (4) respondent provided individuals to assist claimant, and (5) respondent retained control over the manner that the project was to be completed.

After the preliminary hearing, additional testimony was presented by claimant and by respondent's owner, Mr. David Martine. This additional testimony, however, does not change the outcome. Although this case presents a close question, the Board continues to consider the relationship between respondent and claimant to be that of employer and employee for the reasons stated previously and quoted above. The Board adopts the findings and conclusions contained in its previous Order.

The Board will next address the issue of claimant's average weekly wage. The parties agree that claimant was to be a temporary employee earning $15 per hour and would work around the schedule of his regular full-time employment with Ron Peake Design Build, Inc. The Board finds that the job was expected to last only as long as it took to complete the building, which claimant initially testified would have been three days to a week, but later said would have lasted about a week or two. Claimant started on a Friday at about 5 p.m. and worked until dark. He planned to work all day Saturday and Sunday, about 10 hours each day, and then begin at 5 p.m. on the following weekdays. He intended to follow this schedule until the job was completed. The accident occurred during the afternoon of that first Saturday and claimant did not return to the job thereafter. The job was subsequently completed by other employees of respondent, but the record does not reflect how many of respondent's employees worked to complete the building, how many hours they worked or exactly when the building was completed.

As claimant was a part-time hourly employee, employed less than one week before the accident, claimant's average weekly wage should be computed pursuant to K.S.A. 44-511(b)(5) (Furse 1993) "based upon all of the evidence and circumstances." The ALJ found that the project would have taken approximately five days and that claimant would

---

[7] McCubbin v. Walker, 256 Kan. 276, 886 P.2d 790 (1994).

have put in 32 hours.[8] The Board agrees that this is a reasonable estimate based upon the evidence and circumstances and finds, therefore, that claimant's average weekly wage was $480.

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Appeals Board that the Award dated May 8, 2001, entered by Administrative Law Judge Jon L. Frobish should be, and hereby is, affirmed.

**IT IS SO ORDERED.**

Dated this ____ day of December 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
William L. Townsley, III, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Workers Compensation Director

[8] The ALJ actually found that claimant would have put in 30 hours and earned $480, but this is either a mathematical or a typographical error. The Board believes it most likely that the ALJ meant 32 hours (4 hours Friday night, 10 hours Saturday, 10 hours Sunday, 4 hours Monday night, and 4 hours Tuesday night) rather than 30 hours. This would be more consistent with the testimony than 30 hours and would result in the average weekly wage being $480.